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Supreme Court

of the

United States

OCTOBER TERM, 1973

No. 73-449

LOUIS NAKALADSKI, a/k/a LOUIS NASH,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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Petitioner, LOUIS NAKALADSKI, a/k/a LOUIS NASH, prays that a Writ of Certiorari issue to review the opinion and decision of the United States Court of Appeals for the Fifth Circuit entered on July 6, 1973, and denial of Petition for Rehearing entered on August 8, 1973. Petitioner's Motion for Stay of Mandate to the United States Court of Appeals for the Fifth Circuit was denied on August 24, 1973.

OPINIONS BELOW

The opinion and decision of the Court of Appeals is not yet reported. A copy of the decision is attached hereto as Appendix "A". A copy of the order denying Petition for Rehearing is attached as Appendix "B". The order entered by the Court of Appeals denying stay of mandate is attached as Appendix "C".

JURISDICTION

The opinion of the United States Court of Appeals for the Fifth Circuit, which is sought to be reviewed, was entered on July 6, 1973, that Court entering a further order on August 8, 1973 denying Petitioner's Petition for Rehearing. The present Petition for Certiorari is being filed within thirty days of that order.

Petitioner invokes the jurisdiction of this Court under Title 28, Section 1254 (1).

QUESTION PRESENTED

WHETHER THE GOVERNMENT'S WITHHOLDING OF THE LIST OF THOSE WITNESSES TO BE CALLED AT TRIAL IS UNCONSTITUTIONAL IN THAT IT DENIED THE ACCUSED DUE PROCESS OF LAW AND THE RIGHT TO EFFECTIVE REPRESENTATION.

CONSTITUTIONAL PROVISIONS INVOLVED

Amendment V

"No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

Amendment VI

"In all criminal prosecutions, the accused shall enjoy the right to speedy and public trial, by an impartial jury of the State and District wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense."

STATEMENT

Petitioner was convicted in the United States District Court for the Southern District of Florida after a jury trial of conspiring to make and making extortionate extentions of credit in violation of Title 18, U.S.C., Sec. 892; conspiring to participate and participating in the use of extortionate means to collect an extention of credit in violation of Title 18, U.S.C., Sec. 894; and obstructing commerce by extortion in violation of Title 18, U.S.C., Sec. 1951.

Defendant was accused through various counts of involvement in criminal acts with two alleged named victims, Joel Whitice and Richard Besola.

At the trial it developed that Petitioner's total involvement with Whitice was very limited and the absence of any acquaintance with Besola was attested to by Besola himself.

The pre-trial discovery procedure permitted in the Southern District of Florida denied access to the list of witnesses that the government contemplated calling at trial.

The lack of disclosure combined with the vast scope of testimony unrelated to the charges and named victims prevented effective trial preparation by counsel and denied Louis Nash Due Process of Law.

I. Testimony of Whitice and Besola

Richard Besola testified that he borrowed money from James Falco in August or September of 1967 (Tr. 412). Besola testified that he had absolutely no dealings whatsoever with Nash (Tr. 477). He never saw or spoke with Nash.

Joel Whitice testified that he borrowed $10,000.00 from Falco in June of 1966 (Tr. 249). Two subsequent loans were made by Whitice with Falco for $4,000.00 and $8,000.00 (Tr. 251). Whitice made weekly payments to Falco from December of 1966 through September of 1969 (Tr. 245). Whitice testified that he had seen Nash in the presence of Falco on some occasions (Tr. 260). Whitice said that Nash "would sit in the car and never carried on any conversations with him except one time". That conversation concerned the bail bond business, which Whitice had recently entered (Tr. 260). Whitice testified that he did pay money to Nash on more than one occasion but less than five occasions over the three year period of weekly payments made by him (Tr. 261). Although he recognized Nash, Whitice stated that he never knew his name (Tr. 271), nor was he ever introduced to him.

The rate of interest that Whitice stated he agreed to pay to Falco in exchange for the loan was usurious. Whitice testified that he had borrowed the money to put into his grocery business and therefore made his payments from the receipts of the business (Tr. 276). Whitice fell behind in his payments to his suppliers, some of which were located in other states.

Whitice testified that he never received any threats and was never in any fear (Tr. 289-300). Eugene Hutto, a certified public accountant, testified that Whitice stated during a receivership meeting that he wanted him to continue to make the interest payments on the money he owed to Falco, and that he was in fear of not paying (Tr. 374-384). Harry Durant, an attorney present at the meeting, stated that he also heard the statement made by Whitice (Tr. 386).

The testimony had revealed that Petitioner Nash knew Defendant Falco. There were no statements which linked Nash with Falco in any conspiracy. Nash made no statements to Whitice indicating that he was involved in the shylocking business.

II. The Testimony of Goodman, Henzel and Davidow

The testimony that was damaging to Petitioner was the presentation of evidence which concerned criminal acts not charged in the indictment with individuals not named in the indictment. The extent of the prejudice created by their testimony was heightened by the total lack of evidence provided by the "named victims".

Harvey Goodman was a mortgage and insurance broker and he testified that around April of 1966, Petitioner, Falco and Coco used his offices to transact a shylocking business. Nash would use Goodman's office to telephone borrowers for the purpose of effectuating collections (Tr. 111-115). The interest on the loans was usurious (Tr. 111, 113, 115, 116). Goodman testified that on at least one occasion Nash, with Coco present, used threatening language to a delinquent debtor (Tr. 112). Goodman stated that Nash told him that he needed a strong man to work for him for collections (Tr. 119). Goodman recommended a Raymond Seaman who Nash subsequently hired (Tr. 121).

Leo Henzel testified that he borrowed money from Nash at usurious interest rates in November of 1966 (Tr. 206). Henzel stated that when he became delinquent in his payments, Nash would call him and demand the money, using obscene language (Tr. 211-212).

Martin Davidow testified that he borrowed money from Nash at usurious interest rates in October of 1966 (Tr. 520-521). Davidow stated that when he fell behind in his payments, he was threatened by Nash (Tr. 525, 529-530).

REASONS FOR GRANTING WRIT

This case presents a situation where the Trial Court and the Court of Appeals have rendered decisions in conflict with applicable decisions of this Court and with the decisions of other Courts of Appeals on the same matter.

They have also decided an important question of federal law which has not been specifically, but should be, settled by this Court. The effect of the decisions, as will appear from the argument, has been to deprive Petitioner of his constitutional right to prepare an adequate defense to charges levied against him through a grand jury indictment.

ARGUMENT

WHETHER THE GOVERNMENT'S WITHHOLDING OF THE LIST OF THOSE WITNESSES TO BE CALLED AT TRIAL IS UNCONSTITUTIONAL IN THAT IT DENIED THE ACCUSED DUE PROCESS OF LAW AND THE RIGHT TO EFFECTIVE REPRESENTATION.

The government was unable to prove the essential elements of the crime through the named victims and resorted to the use of the Goodman-Henzel-Davidow testimony to prove their case. Without the names of the witnesses there resulted a total conflict between the theory of pretrial discovery and preparation and the absolute surprise presented in this case. Counsel for Nash was faced with allegations of criminal acts not charged in the indictment by individuals not named.

Due Process guarantees the accused a fair trial. It gives him the right to put on evidence in his favor and cross-examine witnesses against him. It forbids the prosecution from acting, even in good faith, to deny him an opportunity to defend himself. Due Process entitles the accused to put on an affirmative defense, *Specht v. Patterson,* 386 U.S. 605, 610 (1967); *Ferguson v. Georgia,* 365 U.S. 570 (1961). It gives him the right to "present evidence" on his behalf and to "offer testimony" by witnesses in his favor:

> "A person's right to reasonable notice of the charge against him, and an opportunity to be heard in his defense — a right to his day in court — are basic in our system of jurisprudence; and these rights include, as a minimum, a right to examine the witnesses against him [and] to offer testimony . . ." *In Re Oliver,* 333 U.S. 257, 273 (1948).

Nash was denied the opportunity to properly prepare for trial and present an affirmative defense. He received notice of the charge against him but found during the

trial that individuals not named in the indictment were accusing him of uncharged crime. Nash was not given reasonable notice of the charge against him as it was essential for Nash to refute the charges made by Goodman, Henzel and Davidow and these were not revealed until the trial. Because the allegations were not formally charged by indictment did not diminish their devasting effect on the jury.

The accused in a criminal trial has the right to receive evidence favorable to his defense. In *Brady v. Maryland*, 373 U.S. 82 (1963), the Court reversed a Maryland State conviction in which the Petitioner was denied the benefit of a third person's confession by concealing its existence:

> "We now hold that the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or punishment, irrespective of the good faith or bad faith of the prosecution." 373 U.S. at 87.

Although *Brady* dealt with the suppression of an exculpatory confession, the list of witnesses of those who would testify to the commission of criminal acts, not charged in the indictment, were necessary, critical, and material.

The importance to the defense of obtaining evidence concerning a specific witness was emphasized by the court in *Napue v. Illinois*, 360 U.S. 264 (1959). *Napue* dealt with the use of false testimony by a witness.

> "The jury's estimate of the truthfulness and reliability of a given witness, may well be determinative of guilt or innocence, and it is upon such subtle factors as the possible interest of the witness in testifying falsely that a defendant's life or liberty may depend."

The guilt or innocence of Petitioner hinged on his ability to attack the credibility of Goodman, Henzel and Davidow, but even the knowledge that they were going to testify was kept from the defense.

Evidence of understandings or agreements between the prosecution and important witnesses were considered essential to a fair trial in *Giglio v. United States*, 31 L. Ed. 104 (1972). The Court stated:

> "Here the Government's case depended almost entirely on Taliento's testimony; without it there could have been no indictment and no evidence to carry the case to the jury. Taliento's credibility as a witness was therefore an important issue in the case, and evidence of any understanding or agreement as to a future prosecution would be relevant to his credibility and the jury was entitled to know of it."

The government's case against Nash depended almost entirely upon the Goodman-Henzel-Davidow testimony. Their credibility was an essential issue in the case and the disclosure of their testimony at trial resulted in an extremely unfair position for the defense. Nash should have been afforded a reasonable time in order to present evidence and testimony to refute the charges raised by Goodman, Henzel and Davidow.

Title 18, U.S.C., Sec. 3500 deals with the production of statements and reports of witnesses to the defense, however the application of the rule has not as yet entitled a defendant to a list of government witnesses prior to trial. *Rodella v. United States,* 286 F. 2d 306 (9th Cir. 1960), cert. denied 365 U.S. 889, 81 S. Ct. 1042, 6 L.Ed. 2d 199 (1961); *United States v. Chase,* 372 F. 2d 453 (4th Cir. 1967), cert. denied, 387 U. S. 907, 913, 87 S. Ct. 1688, 18 L. Ed. 626 (1967); *Rosenzweig v. United States,* 412 F. 2d 844 (9th Cir. 1969).

The proposed Federal Rules provide for discovery of the names of witnesses to be called by the government and any felony record "within the knowledge" of the government attorney, relating to these witnesses. The American Bar Association standards require disclosure of names, criminal records and written or recorded statements of prosecution witnesses.

The procedure in this case enabled the prosecution to go to trial without disclosing to the defense the list of witnesses to be called by the government. Nash was unable to prepare for or investigate the allegations of uncharged crimes which resulted from the Goodman-Henzel-Davidow testimony. Disclosure before trial would have enabled counsel to launch an effective investigation in order to impeach the severely damaging testimony on cross-examination.

The non-disclosure of the witness list results in Petitioner being placed in an untenable position. Most important, however, is the fact that Petitioner was not placed on notice of the charges concerning which testimony was given by Goodman, Henzel and Davidow. Their testimony

did not relate to the crimes charged in the indictment. The inherent problems of having to defend against surprise testimony was pointed out by the Court in *Williams v. Florida*, 399 U.S. 78 (1970). *Williams* presented a Fifth Amendment challenge of Florida's notice-of-alibi provision. The Court held that it did not violate the Fifth Amendment to make the defendant present a notice-of-alibi before a trial.

> "Florida law provides for liberal discovery by the defendant against the State, and the notice-of-alibi rule is itself carefully hedged with reciprocal duties requiring state disclosure to the defendant. Given the ease with which an alibi can be fabricated, the State's interest in protecting itself against an eleventh hour defense is both obvious and legitimate. Reflecting this interest notice-of-alibi provisions dating at least from 1927, are now in existence in a substantial number of states. The adversary system of trial is hardly an end to itself; it is not yet a poker game in which players enjoy an absolute right always to conceal their cards until played. We find ample room in that system, at least as far as "due process" is concerned, for the instant Florida rule, which is designed to enhance the search for truth in the criminal trial by insuring both the defendant and the State ample opportunity to investigate certain facts crucial to the determination of guilt or innocence."

The damaging Goodman-Henzel-Davidow testimony was of the same nature as the alibi witness whose existence is first made known at the time of trial. The possibility of fabrication is certainly possible. Disclosure of the prosecu-

tion's witnesses would have "enhanced the search for the truth" by permitting the defense to investigate the facts crucial to the determination of whether the testimony of Goodman, Henzel and Davidow was factual. "The government was permitted to conceal their cards until played."

As early as the landmark case of *Powell v. Alabama*, 287 U.S. 45 (1932), the Court established that representation by counsel does not alone guarantee the right to counsel unless counsel is able to give effective aid in the preparation and trial of the case. In *Powell* the Defendants were hurried to trial for a capital offense, without adequate opportunity to consult the counsel casually appointed to represent them. The failure of the trial court to afford the Defendants reasonable time and opportunity to secure counsel was a clear denial of due process. The Court stated:

> "Under the circumstances . . . the necessity of counsel was so vital and imperative that the failure of the trial court to make an effective appointment of counsel was likewise a denial of due process."

Counsel for Petitioner Nash was unable to effectively prepare for trial. The testimony most damaging to the case was presented by witnesses unknown to Nash until the trial, concerning activities unrelated to the indictment. The effectiveness of counsel is reduced by the lack of pre-trial disclosure.

In *Brooks v. Tennessee*, 406 U.S. 65 (1972), the Court dealt with a Tennessee State Statute which provided that before the defendant could put on any other defense testimony, he had to testify first. The Court reversed and stated in part:

> ". . . the penalty for not testifying first is to keep the defendant off the stand entirely, even though as a matter of professional judgment his lawyer might want to call him later in the trial. The accused is thereby deprived of the 'guiding hand of counsel' in the timing of this critical element of his defense."

The inability of Nash to obtain the witness list tied the guiding hand of counsel. The right to counsel is denied when counsel is limited in his role presenting the defense. The logical extension of *Brooks*, is in the area of right to counsel, specifically in the area of pre-trial discovery and disclosure.

It is plainly a denial of the right to counsel if the defendant has a lawyer appointed for him on the eve of trial without adequate time to prepare for trial. If counsel were appointed sufficiently before trial but is faced at the trial with a crime not charged in the indictment and witnesses not related to the indictment or revealed in any way before trial he is equally ineffective. A lawyer who cannot get information because of lack of time is no differently situated than a lawyer who has the time but not notice sufficient to permit preparation.

CONCLUSION

The testimony of the victims of the alleged crimes charged in the indictment was insufficient to prove the Government's case. Preparation by counsel prior to trial revealed that their testimony would not show criminal involvement of Nash. However, the Government utilized

the testimony of Goodman, Henzel and Davidow to involve Nash in criminal acts not charged in the indictment. The names of these individuals were withheld until the time of trial.

The approach permitted in this case and similar cases necessarily results in post-conviction procedures rather than pre-trial preparation.

The Goodman-Henzel-Davidow testimony was damaging to Petitioner. Preparation by counsel was made ineffective by the last minute disclosure. The Government was able to withhold the names of these witnesses. Trial preparation by counsel was rendered ineffective by the surprise and highly damaging testimony of Goodman, Henzel and Davidow. Due Process was denied as was Petitioner's right to effective counsel. The discovery procedure deprived Nash of a fair trial. Petitioner does not claim that withholding of witness lists in every case is unconstitutional, but in cases of the nature of those presented by this record, due process is in fact denied.

Petitioner respectfully suggests the propriety of the issuance of the Writ so that the entire record may be reviewed.

Respectfully submitted,

MILTON E. GRUSMARK

CERTIFICATION

I, Milton E. Grusmark, attorney for LOUIS NAKALADSKI, a/k/a LOUIS NASH, Petitioner herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that on the 7th day of September, 1973, I served copies of the foregoing Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit as follows:

1. On the United States, by hand delivering a copy thereof to the office of ROBERT RUST, ESQUIRE, United States Attorney for the Southern District of Florida, at 14 N. E. First Avenue, Suite 300, Ainsley Building, Miami, Florida 33132, and by hand delivering a copy to the Solicitor General, Department of Justice, Washington, D. C. 20530.

MILTON E. GRUSMARK

APPENDIX A

IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 72-3441

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

versus

LOUIS NAKALADSKI, a/k/a LOUIS NASH,
ETTORE COCO, a/k/a EDDIE COCO,
Defendants-Appellants.

Appeals from the United States District Court for the Southern District of Florida

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(July 6, 1973)

Before BELL, GOLDBERG and SIMPSON, Circuit Judges.

GOLDBERG, Circuit Judge: Appellants, Louis Nakaladski, a/k/a Louis Nash [hereinafter "Nash"], and Ettore Coco, a/k/a Eddie Coco [hereinafter "Coco"], were convicted of violating various anti loan sharking provisions of Title II of the Consumer Credit Protection Act, 18 U.S.C. § 891 *et seq.* Specifically, they were

found guilty of: (1) conspiring to make and making extortionate extensions of credit in violation of 18 U.S.C. § 892;[1] (2) conspiring to participate and participating in the use of an extortionate means to collect an extension of credit in violation of 18 U.S.C. § 894;[2] and (3) obstructing commerce by extortion in violation of the anti-racketeering provisions of the Hobbs Act, 18 U.S.C. § 1951. Appellants attack their convictions on numerous grounds, however we find that appellants received a full and fair trial and that there is ample evidence to support their convictions. We affirm.

I. THE PROCEEDINGS BELOW

Appellants were charged in an eight-count indictment with various violations of federal laws outlawing extortionate credit practices. At the trial, the government presented evidence concerning appellants' credit loan transactions with the two victims named in the indictment, Joel Whitice and Richard Besola, in order to prove the crimes charged in the indictment. The government also introduced evidence concerning similar extortionate credit transactions appellants had

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[1] 18 U.S.C. § 891 (6) defines an extortionate extension of credit as: "any extension of credit with respect to which it is the understanding of the creditor and the debtor at the time it is made that delay in making repayment or failure to make repayment could result in the use of violence or other criminal means to cause harm to the person, reputation, or property of any person."

[2] 18 U.S.C. § 891(7) defines an extortionate means of collection as: "any means which involves the use, or an express or implicit threat of use, of violence or other criminal means to cause harm to the person, reputation, or property of any person."

with other individuals in order to establish appellants' intent and their general conspiratorial course of conduct.

Viewed in a light most favorable to the government, *Glasser v. United States*, 1942, 315 U.S. 60, 80, 62 S.Ct. 457, 86 L.Ed. 680, 704, the evidence introduced at the trial established that Coco, Nash, and one James Michael Falco[3] were in the loan sharking business together as early as 1966. During that year they began to transact some of their business in the offices of one Harvey Goodman, a mortgage and insurance broker. Goodman testified that he heard discussions concerning the making of loans and collections. When Nash or Falco arranged to make a loan in Coco's absence they would telephone Coco to obtain his approval. On one occasion, Falco objected to a loan that Nash wanted to make on the ground that there had been difficulties in collecting a previous loan from the prospective borrower, but when Coco said that Nash would be responsible for collecting the new loan, it was approved.

The interest on the loans that Falco, Nash, and Coco made was shown to be highly usurious: (1) a $3,000 loan was repayable at the rate of $1,000 a month for four months; (2) a $400 loan, with $200 interest, was repayable at the rate of $50 a week. At one point Nash offered to extend loans to any of Goodman's customers who needed money at interest rates of "up to five percent per week."

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[3]James Michael Falco was indicted with appellants but is apparently a fugitive and was not tried with appellants.

Nash used Goodman's office to telephone borrowers in order to make collections. Goodman testified that on at least one occasion Nash threatened a delinquent debtor by saying "you better have our money there at one o'clock or I'll feed you your eyeballs." In April of 1967, Nash told Goodman that he needed "another strong man to work for him for collections," and Goodman offered to get in touch with a man named Raymond Seaman, who had a reputation "as muscle": Nash hired Seaman, whom he later described as "a good man, except he had a big mouth." After Seaman was found dead in a canal as a result of an automobile accident, Nash told Goodman, in the presence of Coco and Falco that Seaman "fell in the canal — nobody cared." Goodman testified that at that time "Mr. Coco did not say anything. He just smiled."

Appellants also advanced money to an individual named Leo Henzel. When Henzel received a $1,500 loan from Nash in November, 1966, he was told "[j]ust as easy as you get it, that's how easy we want it back." The terms of the loans were that he was to pay $300 per week interest until he had paid back the entire principal. This loan was finally settled eight or nine months later with a $1,800 payment, by that time Henzel had already paid $4,500 to $5,000 in interest, making his total payment on the $1,500 loan between $6,300 and $6,800. When Henzel became delinquent in his payments, Nash called him and used obscene language in demanding the money. On several occasions, Nash informed him that the source of the loan money was "underworld elements, Mafia, and so forth."

Nash also lent $2,000 to Martin Davidow in October, 1966, on the condition that Davidow pay $150 per week for twenty weeks. In December of 1966, Davidow borrowed another $3,000, the terms being that he was to pay $150 in interest and $150 on the principal, in addition to the $150 from the October loan, for a total payment of $450. In February, 1967, Davidow borrowed another $3,000, on the same terms as his December, 1966 loan, raising his total weekly payment to $750. A few months later, Davidow borrowed from Nash again, bringing his total loan to approximately $10,000 and his total weekly payments to approximately $900. In the middle of 1969, Davidow fell about $1,000 behind in payments and arranged with Nash to pay $250 per week interest and nothing on the principal. By this time he had paid approximately $15,000 in interest and still owed the full $10,000 principal. When Davidow fell behind in his payments, Nash told Davidow that he "had better pay and that he [Nash] was aware of the fact that ... [Davidow] had a wife and children." On another occasion Nash told Davidow that when a man named "Gee-Gee" had fallen behind in his payments, Nash had sent a couple of people to "straighten Gee-Gee out" by beating him up and that "Gee-Gee was making payments now."

In June or July of 1966, Joel Whitice procured his first loan from Falco. Whitice made most of his payments to Falco, who was accompanied by Nash and Coco on a number of occasions when he came to collect from Whitice. At other times Whitice also made payments to Nash or Coco. During this time Whitice operated a retail grocery business, Food Palace, Inc.,

in partnership with another man, selling items manufactured in various parts of the country. His initial loan was for $10,000, which he paid back in approximately one year with weekly payments of $300. In December of 1967, Whitice borrowed another $4,000, and in June he increased his total debt to $12,000. He paid interest on these loans at the rate of $25 per $1,000 per week, and by June of 1968 his total interest payment was $300 per week. By September of 1969, Whitice had paid approximately $27,600 in interest, and still owed the full $12,000 principal.

Whitice had borrowed the money for his grocery business and he made payments from the receipts of the business. While keeping up his payments to Falco, however, he fell behind in his payments to his suppliers. In June of 1969, the major supplier filed a complaint in state court alleging defaults on securities and promissory notes and sought the appointment of a receiver to take over the operation of Whitice's business. After negotiations, a stipulation was entered into permitting Whitice to operate the business for an interim period, on the condition that all checks had to be counter-signed by an accountant representing the supplier. The stipulation also provided that no payments of pre-existing claims or indebtedness were to be made during the interim period, but a specific exception was written in permitting the business to continue to make the weekly $300 payments to Falco because Whitice made it clear that he would not enter into any stipulation or agreement that did not allow him to continue making these payments. He explained that if he were forced to cut the payments off, it might result in harm

to him or his family. The accountant representing the supplier recalled that Whitice stated that he was in fear of his life, and the supplier's attorney recalled Whitice saying, in effect, that if he could not make the payments he might as well jump out the window. The supplier's representatives therefore agreed to permit the payments to be made.

After the receiver took over Whitice's grocery business, Falco visited Whitice to inquire whether the latter had any property on which he could give a mortgage. Upon receiving a negative response, Falco said that he would forget the interest if Whitice could repay the principal, whereupon he was informed that the latter had no money at all. Later, after Whitice had gone into the bail bond business, Falco asked for further payments. Around May of 1970, Falco called from New Jersey and asked that money be mailed to him, and Whitice sent a check. Still later Falco called again and told Whitice not to send any more checks, and arranged to have money picked up from time to time at Whitice's office.

Richard Besola, a general building contractor, also procured a loan from Falco. In 1967, he needed money, and one of his subcontractors, a man named Rappa, contacted Falco, from whom Besola eventually received a $3,000 check. Besola was to pay the money back within thirty or sixty days, with an additional $600 as interest. When six or seven weeks went by and Besola had not repaid the loan, Coco visited him at his job site and told him that he had "made a deal" and had "better live up to it." Besola then commenced

making weekly payments of $100, initially to sub-contractor Rappa, but later, after Rappa had indicated a desire not to be bothered with the matter, Besola brought them to Coco's house. Besola made payments on a sporadic basis, and made approximately twenty four payments in all. About a year after Besola first met Coco, Coco again visited him and inquired about getting the debt "squared up." He pointed out that Besola was at that time building a house for a banker, and suggested that Besola make an arrangement with the banker to get the loan paid off. Besola then procured a $1997 bank loan, which was converted into a certificate of deposit which was then issued and mailed to Falco on May 29, 1968. A $2,000 certificate of deposit that Falco had purchased on April 15, 1968 was put up as collateral for the loan, and when Besola defaulted on the loan with $300 unpaid, Falco's collateral was cashed and applied to the loan, with the remaining $1,674.27 of the collateral being returned to Falco.

Besola had become concerned when he was unable to make the lump sum repayment to Falco within the agreed upon thirty-to-sixty day period. He felt that he had to get the loan repaid "one way or another," as he had become aware "after a few weeks went by that the people I borrowed from weren't exactly bankers." He knew, for example, that Coco had once been "involved in a shooting." Besola claimed that he was not personally afraid of Coco or Falco, but he was aware of the possibility that they could send "somebody out" to "put pressure" on him. His family, moreover, was worried, and communicated their fears to him and their expressed anxieties caused him anxiety

and made him desire to settle the debt as soon as possible.

After a three day jury trial, at which the jury heard and considered all of the evidence concerning the foregoing transactions, the jury found appellants guilty of: (1) obstructing commerce by extorting payments from Joel Whitice in violation of the Hobbs Act, 18 U.S.C. § 1951; (2) conspiring to make extortionate extensions of credit to Joel Whitice in violation of 18 U.S.C. § 892; (3) conspiring to use extortionate means to collect or to attempt to collect extensions of credit from Joel Whitice and Richard Besola in violation of 18 U.S.C. § 894; (4) making extortionate extensions of credit to Joel Whitice in violation of 18 U.S.C. § 892; and of (5) using extortionate means to collect or to attempt to collect extensions of credit from Joel Whitice in violation of 18 U.S.C. § 894. Coco alone was convicted of using extortionate means to collect or to attempt to collect extensions of credit from Richard Besola in violation of 18 U.S.C. § 894. Nash received concurrent sentences of ten years imprisonment on each count upon which he was convicted and was fined $5,000 on the § 1951 count. Coco received concurrent sentences of fifteen years imprisonment on each of the six counts upon which he was convicted, and was fined $10,000 on each count for a total fine of $60,000.

In this appeal, appellants jointly attack their convictions, contending that:

(1) The District Court erred in admitting the testimony of Goodman, Henzel and Davidow.

(2) The evidence was insufficient to support appellants' convictions.

(3) The District Court erred in admitting a tape recording of a conversation appellant Coco had engaged in that was made approximately ten months after the events named in the indictment.

(4) Improper statements by witnesses prejudiced the jury and denied appellants a fair trial.

(5) The District Court erred in refusing Coco's motion for a severance.

(6) The District Court erred in refusing Coco's requests for a continuance.

(7) The grand and petit juries that indicted and convicted appellants were improperly selected.[4]

II. THE GOODMAN-HENZEL-DAVIDOW TESTIMONY

Appellants contend that the trial judge erred in allowing the government to present the testimony of Goodman, Henzel and Davidow concerning criminal

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[4]Appellants have joined in each other's assignment of error. Our dispositions of their assignments jointly in no way represents a ruling on the standing of each to assert the errors relied upon by the other.

transactions that were not specifically mentioned in the indictment and that occurred during time periods not covered by the indictments on the grounds that such testimony was irrelevant and prejudicial. Although evidence of criminal conduct not charged in the indictment may not be admitted if it serves solely to show the defendant's bad character or criminal propensities, *see Michaelson v. United States*, 1948, 335 U.S. 469, 475-476, 69 S.Ct. 213, 93 L.Ed. 168, 173-174, the testimony of Goodman, Henzel and Davidow was not admitted for that purpose. Their testimony was highly relevant, and it was admissible because it established that appellants had entered into a conspiracy to make extortionate extensions of credit and to collect payments by extortionate means as early as 1966 and that this general conspiracy was carried over into appellants' dealings with Whitice and Besola. The challenged testimony illuminated the nature of the conspiracy and established that appellants were not merely fringe associates in the conspiracy, but rather intended to actively participate in that conspiracy. Thus the Goodman-Henzel-Davidow testimony was relevant and admissible to show: (1) appellants' motive and intent in their dealings with Whitice and Besola; *Matthews v. United States*, 5 Cir. 1969, 407 F.2d 1371, 1381, *cert. denied*, 1970, 398 U.S. 968, 90 S.Ct. 2177, 2178, 26 L.Ed.2d 554; *Myers v. United States*, 5 Cir. 1967, 377 F.2d 412; *Wilkins v. United States*, 5 Cir. 1967, 376 F.2d 552, *cert. denied*, 1968, 390 U.S. 951, 88 S.Ct. 1043, 19 L.Ed.2d 1144; *Weeks v. United States*, 10 Cir. 1963, 313 F.2d 688, *cert. denied*, 1963, 373 U.S. 922, 83 S.Ct. 1523, 10 L.Ed.2d 421; *Devoe v. United States*, 8 Cir. 1939, 103 F.2d 584, *cert. denied*, 1939, 308 U.S. 571, 60

S.Ct. 84, 84 L.Ed. 479; (2) appellants' method of business, their "overall modus operandi"; *United States v. Haley*, 8 Cir. 1971, 452 F.2d 391, *cert. denied*, 1972, 405 U.S. 978, 92 S.Ct. 1205, 1206, 31 L.Ed.2d 253; (3) the existence of a general conspiracy of which the conspiratorial and substantive offenses involving Whitice and Besola were integral parts; *United States v. Restrepo*, 5 Cir. 1969, 417 F.2d 927; *Matthews v. United States, supra; Collins v. United States*, 10 Cir. 1967, 383 F.2d 296; *Devoe v. United States, supra;* and (4) the relation between appellants and Falco; *Devoe v. United States, supra.*[5]

III. SUFFICIENCY OF THE EVIDENCE

A. The Section 892 Convictions

Appellants were convicted of conspiring to make and making extortionate extensions of credit to Joel Whitice in violation of 18 U.S.C. § 892. An extortionate

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[5]Appellants also contend that the Goodman, Henzel, Davidow testimony should not have been admitted because these individuals were not named in the indictment and appellants were consequently unable to prepare for trial. In effect, appellants are complaining because the government failed to provide them with a list of prospective witnesses and with information sought in their motion for a bill of particulars. We find no abuse of the trial court's discretion in its refusal to require the government to provide a list of witnesses, *United States v. Mosely*, 5 Cir. 1971, 450 F.2d 506, 510; *United States v. Hancock*, 5 Cir. 1971, 441 F.2d 1285, *cert. denied*, 1971, 404 U.S. 833, 92 S.Ct. 81, 30 L.Ed.2d 63; *O'Neal v. United States*, 5 Cir. 1969, 411 F.2d 131, *cert. denied*, 1969, 396 U.S. 827, 90 S.Ct. 72, 24 L.Ed. 2d 77, or in its refusal to grant appellants' motions for bills of particulars in their entirety. *Hickman v. United States*, 5 Cir. 1969, 406 F.2d 414, 415, *cert. denied*, 1969, 394 U.S. 960, 89 S.Ct. 1309, 22 L.Ed. 2d 561.

extension of credit is one in which both the creditor and the debtor understand that default or delinquency in making payments "could result in the use of violence or other criminal means to cause harm to the person, reputation or property of any person." 18 U.S.C. § 891(6). In order to convict appellants of conspiring to make an extortionate extension of credit, it was necessary for the government to prove only that appellants had planned and intended that Whitice would understand the possibility that harmful consequences could be attendant upon his default or delinquency. *United States v. Annoreno*, 7 Cir. 1972, 460 F.2d 1303, 1309 n. 7; *see Carbo v. United States*, 9 Cir. 1963, 314 F.2d 718, 740-741, *cert. denied*, 1964, 377 U.S. 953, 84 S.Ct. 1625, 12 L.Ed.2d 498. In order to prove the substantive violation of §892, however, it was essential for the government to prove that Whitice actually had such an awareness of the possible harm that could arise from default or delinquency in repaying the loans to Falco.

We find that the government carried its burden both with regard to the conspiracy count and with regard to the substantive count. The testimony clearly showed the existence of a conspiracy between Falco, Coco, and Nash to make extortionate extensions of credit, and it was entirely reasonable for the jury to find that this conspiracy embraced appellants' dealings with Whitice. Likewise, although the loans to Whitice were made by Falco, appellants participated both in the conspiracy to make the extortionate loans and in in the collections from Whitice, and there can thus be no question of their culpability for the substantive

crime. *Pinkerton v. United States,* 1946, 328 U.S. 640, 646-647, 66 S.Ct. 1180, 90 L.Ed. 1489, 1496-1497.

Appellants contention that the court erred in allowing witnesses to testify concerning Whitice's fear of the consequences of non-payment because Whitice was available to give "direct" testimony concerning his understanding of the dangers attendant upon default or delinquency is also without merit. If in order to convict for violations of § 892, the government is required to establish the crime through the testimony of an available victim, the congressional intent to protect citizens from extortionate credit practices could be circumvented by terrorizing the victim. *See United States v. DeLutro,* 2 Cir. 1970, 435 F.2d 255, 256, *cert. denied,* 1971, 402 U.S. 983, 91 S.Ct. 1657, 29 L.Ed.2d 148. The testimony of an accountant and an attorney who dealt with Whitice when he was being placed in receivership concerning Whitice's obvious fear of missing a payment is ample "direct" evidence of Whitice's state of mind concerning the nature of his loans. The evidence of Whitice's state of mind was perhaps even more probative than any "direct" testimony would have been because it graphically demonstrated that he was aware that harmful consequences could arise from default or delinquency in paying the loans to Falco. *See United States v. DeCarlo,* 3 Cir. 1972, 458 F.2d 358, 363-365.

B. The Section 894 Convictions

In order to find appellants guilty of conspiring to use extortionate means to collect or to attempt to col-

lect extensions of credit from Joel Whitice and Richard Besola in violation of 18 U.S.C. § 894 it was necessary for the jury to find that it was the intent of appellants to use threats or actual violence whenever necessary to collect payments from Whitice and Besola. The jury was presented with ample evidence that this was the *modus operandi* of the enterprise in which appellants were engaged, and the finding that appellants adhered to the conspiratorial plan and conspired to use threats, and violence if necessary, to collect payments from Whitice and Besola is entirely reasonable.

There was also ample evidence to support the jury finding that appellants had knowingly participated in the express or implicit threat of the use of violence or other criminal means to cause harm to the person, reputation, or property of Joel Whitice in collecting or attempting to collect loan payments from him. As previously discussed in Part IV, Subsection A, *supra*, appellants were parties to the making of extortionate extensions of credit to Whitice, extensions of credit which by their very definition were based upon Whitice's understanding that default or delinquency might result in the use of violence. Thus any collections on the extortionate extensions of credit to Whitice made by appellants, who knew of the extortionate character of the loans, necessarily involved the implicit threat of the use of violence in violation of 18 U.S.C. § 894. In short, by accepting payments from Whitice, with knowledge of the extortionate nature of his loan, appellants "participated" in an extortionate collection means within the meaning of 18 U.S.C. § 894.

C. The Section 1951 Conviction

Appellants were also convicted of obstructing interstate commerce by extorting payments from Joel Whitice in violation of the Hobbs Act, 18 U.S.C. § 1951. They contend that this conviction cannot stand because there was no showing that Whitice was in fear and because the loan to Whitice was made personally to him, and not to Food Palace, Inc., his store, which purchased articles in interstate commerce.

In order to establish a violation of the Hobbs Act it was necessary for the government to show: (1) that appellants induced Whitice to part with property; (2) that they did so through the wrongful use of actual or threatened force, violence or fear; and (3) that in so doing they adversely affected interstate commerce. *United States v. Addonizio*, 3 Cir. 1972, 451 F.2d 49, 59, *cert. denied, 1972*, 405 U.S. 936, 92 S.Ct. 949, 30 L.Ed.2d 812; *United States v. Tolub*, 2 Cir. 1962, 309 F.2d 286. Under the Hobbs Act it is not necessary that the subject of the extortion constitute interstate commerce, or that the purpose of the extortion be to effect interstate commerce. All that is required is that trade be affected by extortion "in any way or degree," *Carbo v. United States*, 9 Cir. 1963, 314 F.2d 718, 732;[6] *see United States v. Addonizio, supra*, 451 F.2d at 77, and that the victim

[6] In *Carbo v. United States, supra*, the court held that an extortionate transaction which affected a contract between a professional prize fighter and his manager, as well as the prize fighter's earnings, had sufficient effect on interstate commerce to support a Hobbs Act conviction because the interstate business of promoting professional championship boxing contests was affected in some degree by extortion aimed at obtaining control of a professional fighter. 314 F.2d at 732.

have been induced to part with property through the use of fear. *United States v. Tolub, supra.* As discussed in earlier portions of this opinion, there was ample evidence from which the jury could determine that appellants participated in a scheme in which Whitice was induced by a reasonable fear to make payments on his loan, and that interstate commerce was affected by his inability to make payments to suppliers who were engaged in interstate commerce.

D. Coco's Section 894 Conviction

Appellant Coco, alone, was indicted and convicted for using extortionate means to collect or to attempt to collect extensions of credit from Richard Besola in violation of 18 U.S.C. § 894. He challenges this conviction on the ground that there was no evidence that Richard Besola had ever been threatened or placed in fear in connection with the loan payments that he made to Coco. At the trial, Besola testified that he was not personally afraid of Coco or Falco, however, he also testified that his family was in fear because of his transactions with Falco and Coco and that they communicated this anxiety to him. Moreover, Besola testified that he was concerned about paying off his loan and that "I knew after a few weeks that the people that I borrowed money from weren't exactly bankers." He further testified that there was always a possibility that Falco or Coco could send somebody out to put pressure on him and that he was aware that Coco had been involved in a shooting. Although Besola denied being in fear of Coco or Falco, the jury could reason-

ably have discounted this statement[7] and found from Besola's other testimony that Coco had participated in the collection of a loan by the use of implicit threats.[8]

IV. THE TAPE RECORDING

Appellants contend that the District Court erred in admitting into evidence a legally obtained tape recording of a conversation that appellant Coco had with a party not involved in the indictment approximately ten months after the events charged in the indictment. In this conversation, Coco made a statement concerning what he would do to delinquent borrowers — that he would "bust their heads with his knuckles." This tape recording was admitted only with regard to appellant Coco and only for the limited purpose of showing his intent to commit the crimes charged in the indictment. Appellants recognize the general rule that events occurring subsequent to the crime charged in the indictment are admissible to show intent, where intent is an ele-

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[7]There are numerous reasons why the jury could discount Besola's direct denial of fear and infer from his other testimony concerning the loan transaction that he had been implicitly threatened. For example, two logical explanations might be that: (1) his denials of fear were merely the bravado of a man anxious to maintain his *machismo;* or (2) his denials of fear were induced by a fear of testifying adversely to an individual who was known to him to be of a violent character.

[8]Appellants reliance on the acquittals in *United States v. Falcone,* 1940, 311 U.S. 205, 85 L.Ed. 128, *Carbo v. United States, supra,* and *United States v. Webb,* 6 Cir. 1966, 359 F.2d 558, is unfounded. In all of those cases the conspiratorial convictions were reversed because there was no showing of a knowing participation in the charged illegal conspiratorial plan. In the case before us there is ample evidence that appellants knowingly adhered to and participated in the conspiratorial and substantive offenses charged.

ment of the offense charged, if the events are not "too remote in point of time from the offense charged." *Matthews v. United States, supra,* 407 F.2d at 1381; *see United States v. Goodwin,* 5 Cir. 1972, 470 F.2d 893, 899. They nevertheless contend that the tape was not admissible to show Coco's intent for two reasons: (1) persons not named in the indictment were mentioned in the tape recording, and (2) the tape was too remote in time to the events named in the indictment. "Evidence that similar or related offenses were committed over a period of time tends to show a consistent pattern of conduct highly relevant to the issue of intent." *Gilstrap v. United States,* 5 Cir. 1968, 389 F.2d 6, 9. Since intent is an element of all of the offenses for which Coco was charged, and since the tape recording contained a conversation concerning Coco's method of dealing with delinquent borrowers, it is clear that the tape was admissible to show his intent to commit the crimes for which he was charged. Moreover, the trial court had discretion to weigh the prejudicial character of the conversation against its relevancy, *United States v. Bell,* 5 Cir. 1972, 457 F.2d 1231, 1237, and in light of the fact that Coco's conversation concerned a similar criminal transaction occurring less than one year after the events charged in the indictment, we find no abuse of that discretion. *See Nees v. Culbertson,* 5 Cir. 1969, 406 F.2d 621, 625, *cert. denied,* 1969, 395 U.S. 959, 89 S.Ct. 2098, 23 L.Ed.2d 745; *Miller v. United States,* 5 Cir. 1968, 397 F.2d 272, 274.*

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*In *Miller v. United States, supra,* this Circuit approved the admission of evidence concerning an uncharged illegal transaction in order to show the accused's intent, even though the crime had occurred five years prior to the crime under consideration.

V. THE "IMPROPER" TESTIMONY

Appellants allege that the District Court erred in failing to grant their motions for mistrial based upon the following testimonial incidents, which appellants claim denied them a fair trial:

(1) When government witness Goodman was asked what was said at the first time that Nash, Falco and Coco came together, he answered: "The first time I met Mr. Coco, this was with reference to seeing if I could get his probation —" at which point the government cut him off. Appellants contend that Goodman's voluntary statement naturally led the jury to infer that Coco had been convicted of a prior crime, *see United States v. Reed*, 7 Cir. 1967, 376 F.2d 226, and thus denied him a fair trial by prejudicing the jury. *See Michaelson v. United States, supra.* The government responds that a mistrial is not warranted if the challenged testimony was blurted out by a witness, *see United States v. Jacangelo*, 3 Cir. 1960, 281 F.2d 574, 576, unless there is a clear showing of prejudice. In light of the fact that Coco himself introduced a tape recording of an interview with Richard Besola that included a clear inference that Coco had been imprisoned, we find that Coco's substantial rights were not affected by Goodman's testimony. *See* Rule 52, F.R. Crim. P.; *Porter v. United States*, D.C. Cir. 1958, 258 F.2d 685, *cert. denied*, 1959, 360 U.S. 906, 79 S.Ct. 1209, 3 L.Ed.2d 1257. We do not in any way see how Nash's substantial rights might have been violated.

(2) Goodman also made two conclusory statements to the effect that appellants were partners with Falco in the shylocking business. Appellants' objections to

these statements were sustained and the jury was directed to disregard them. We think that the trial judge's timely ruling and instructions fully safeguarded appellants' rights.

(3) Appellants allege that Goodman's testimony concerning Seaman's death in an automobile accident contained an implication that appellants were responsible for Seaman's death and that their motions for a mistrial based on this testimony should therefore have been granted. Goodman testified: "I asked Mr. Nash, because I knew him best of anybody, about if he knew anything of what happened to Ray Seaman. He said, 'Well, he fell in the canal and he had a big mouth — nobody cared.'" Goodman then testified that "Mr. Coco did not say anything. He just smiled." We find no error in the denial of appellants' motions for a mistrial. Goodman's testimony merely related appellants' own statements and actions. Any inuendo of wrongdoing raised by Goodman's testimony was thus derived solely from appellants' own statements and actions and constituted admissions concerning conduct taken in furtherance of the general conspiracy. *See United States v. Pierce*, 5 Cir. 1969, 411 F.2d 678; *Tucker v. United States*, 5 Cir. 1960, 279 F.2d 62, 64; *United States v. Steel*, 10 Cir. 1972, 458 F.2d 1164; *United States v. Alker*, 3 Cir. 1958, 255 F.2d 851.[10]

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[10]Assuming that there is an inuendo of wrongdoing in appellants' statement and actions, they do not constitute confessions to the crimes charged, but rather admissions concerning the general conspiracy, which were probative of appellants' intent to use force in furtherance of the conspiracy, and thus we are not faced with any of the problems raised by the admission of a co-defendant's confession to the crimes charged. *See Bruton v. United States*, 1968, 391 U.S. 123, 88 S.Ct. 1620, 20 L.Ed.2d 476.

(4) Government witness Henzel testified that Nash had told him that money Henzel had borrowed from Nash "came from underworld elements, Mafia, and so forth." Appellants claim that this testimony was so prejudicial that the Court should have declared a mistrial. Although the mention of the "Mafia" may elicit fear and distaste in the minds of the average juror, it undoubtedly may also cause such a response in the average debtor, and we find that Henzel's testimony was so relevant to the crimes charged in the indictment that there was no error in its being considered by the jury. The fact that Nash told Henzel — an individual to whom he had lent money at exorbitant rates — that the money came from the "Mafia" was quite relevant in showing Nash's intent to put Henzel in fear and in showing the method of operation of the conspiracy. Any prejudice that might have been aroused through the use of the term "Mafia" was insignificant in comparison with the probative value of the fact that Nash used that term, and we find that the District Court did not abuse its discretion in striking the balance between relevancy and prejudice. *United States v. Bell, supra.* We therefore reject appellants' challenge to the fairness of their trial based upon the introduction of "improper" testimony.

VI. COCO'S MOTION FOR A SEVERANCE

Appellant Coco contends that the District Court erred in refusing to grant his motion for a separate trial. He contends that four statements Nash made to FBI investigators exculpated him and that he was prejudiced by his inability to call Nash to the stand to question him concerning the statements.

The grant or denial of a motion for a separate trial under Rule 14 F.R. Crim. P. is largely a matter for the discretion of the trial judge. *Opper v. United States*, 1954, 348 U.S. 84, 75 S.Ct. 158, 99 L.Ed. 101; *Smith v. United States*, 5 Cir. 1967, 385 F.2d 34, 37. Only if the defendant can demonstrate a clear showing of prejudice resulting in the denial of a fair trial will the discretionary ruling of the trial judge be reversed on appeal. *United States v. Iacovetti*, 5 Cir. 1972, 466 F.2d 1147, 1153; *Smith v. United States, supra*. Coco did not make a convincing showing that Nash would be more likely to give exculpatory testimony for Coco if the trials were severed,[11] *Byrd v. Wainwright*, 5 Cir. 1970, 428 F.2d 1017, 1022, and we find that the District Court did not abuse its discretion in denying Coco's motion for a separate trial. *United States v. Iacovetti, supra*, 460 F.2d at 1153; *Smith v. United States, supra*, 385 F.2d at 38.

Relying on *DeLuna v. United States*, 5 Cir. 1962, 308 F.2d 140, Coco also contends that a separate trial should have been granted so that in the event that

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[11]At trial, the only showing that Coco made that Nash *might* testify is contained in the following colloquy between Coco's attorney and Nash's attorney:

> Coco's attorney: "Are you saying now that if the Court were to grant a severance and your client, Mr. Nash, were tried first and if he were acquitted, that he would subsequently testify in Mr. Coco's trial?"
> Nash's attorney: "I am saying if that course of events took place, that there would certainly be serious consideration of his testifying."

On these facts, Coco's contention of prejudice is at best speculative, since Nash would only consider testifying *if he were acquitted*, and "[w]e do not conjecture abuses of discretion." *Smith v. United States, supra*, 385 F.2d at 38.

Nash took the stand and claimed the Fifth Amendment, Coco would have been able to urge the jury to draw favorable inferences from Nash's refusal to testify. The *DeLuna* ruling, which recognized the right of defendants in certain circumstances to comment on the failure of a co-defendant to testify, is, however, limited only to those occasions where the defendants' defenses are based on mutually exclusive theories of guilt, *United States v. Hyde*, 5 Cir. 1971, 448 F.2d 815, 832, *cert. denied*, 1972, 404 U.S. 1058, 92 S.Ct. 736, 737, 30 L.Ed.2d 745, that would create a duty upon counsel to comment upon the refusal of the other defendant to testify. *Gurleski v. United States*, 5 Cir. 1968, 405 F.2d 253, *cert. denied*, 1969, 395 U.S. 981, 89 S.Ct. 2140, 23 L.Ed.2d 769. No such mutually exclusive defense theories are presented in the instant prosecution.

VII. COCO'S MOTION FOR A CONTINUANCE

Near the close of the trial Coco moved for a two hour continuance or for permission to reopen so that he could introduce rebuttal testimony from Richard Besola's son. Coco alleged that he was taken by surprise when Richard Besola testified that his family had been fearful because of his dealing with Coco and Falco because Besola had denied any fear in a pretrial conversation with Coco's attorney. Coco alleged that Richard Besola's son would testify that the family was not in fear. The Court denied Coco's motions on the grounds that (1) there was no surprise, and (2) Coco could have subpoenaed the son either before the trial began or on the evening prior to the close of the trial, immediately after he was allegedly "surprised."

After considering (1) the text of Richard Besola's pretrial conversation with Coco's attorney, (2) his "surprise" trial testimony, (3) a transcript of Besola's son's allegedly contradictory remarks, and (4) Coco's attorney's statements concerning the failure to timely subpoena Besola's son, we do not find that the trial court erred in determining that Coco was not surprised and that he had failed to exercise due diligence in subpoenaing Besola's son. We therefore hold that the District Court did not abuse its discretion in denying Coco's motion for a continuance, *United States v. Roca-Alvarez,* 5 Cir. 1971, 451 F.2d 843, and his motion to reopen. *United States v. Burger,* 5 Cir. 1969, 419 F.2d 1293.

VIII. THE GRAND AND PETIT JURY PANELS

Appellants final contention is that they were denied a fair trial because the grand and petit jury selection methods utilized at the time and place of their indictment and trial excluded two groups of potential jurors: young voters and Cuban Americans. This argument has been considered at length and rejected by this Circuit in *United States v. Gooding,* 5 Cir. 1973, 473 F.2d. 425, and we are bound by the rationale and decision in that case.

IX. CONCLUSION

Appellants have raised a skillful but unconvincing multifaceted attack on their convictions. Being firmly convinced that appellants received a fair trial and that the jury's verdict was supported by the evidence, we affirm.

AFFIRMED

AUG 8 1973
EDWARD W. WADSWORTH
CLERK

APPENDIX B

IN THE

RECEIVED AUG 10 1973

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 72-3441

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

versus

LOUIS NAKALADSKI, a/k/a LOUIS NASH,
ETTORE COCO, a/k/a EDDIE COCO,
Defendants-Appellants.

Appeals from the United States District Court for the Southern District of Florida

ON PETITION FOR REHEARING

(AUGUST 8 , 1973

Before BELL, GOLDBERG and SIMPSON, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed on behalf of appellant, Louis Nakaladski, a/k/a Louis Nash in the above entitled and numbered cause be and the same is hereby denied.

APPENDIX C

U.S. COURT OF APPEALS
FILED
AUG 24 '73
EDWARD W. WADSWORTH
CLERK

IN THE UNITED STATES COURT OF APPEALS FOR THE
FIFTH CIRCUIT.

NO. 72-3461

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

LOUIS NAKALADSKI, a/k/a LOUIS NASH,
ETTORE COCO, a/k/a Eddie Coco,

Defendants-Appellants.

Appeals from the United States District Court
for the Southern District of Florida

O R D E R: -

ON CONSIDERATION of the motion of Louis Nakaladski for stay of the issuance of mandate in the above entitled and numbered cause, and of the opposition of Appellee thereto,

IT IS ORDERED that said motion be, and it is hereby DENIED.

UNITED STATES CIRCUIT JUDGE